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January 17, 2003

EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147*

Dear Ms. Dortch:

The attached letter from S. Guyer of Verizon was provided to W. Maher of the Wireline Competition Bureau today. Please place it on the record in the above proceeding. Please let me know if you have any questions.

Sincerely,

Attachment

cc: W. Maher
J. Carlisle
M. Carey
R. Tanner
J. Miller
S. Bergmann
B. Olson
T. Navin

January 17, 2003

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12 th Street, SW
Washington, DC 20554

Dear Mr. Maher:

This letter briefly addresses issues that have been raised with respect to Verizon's provisioning policy for unbundled network elements and explains the very real concerns and reasons behind Verizon's current policy.

Competing carriers have argued that Verizon should be required to build network facilities and to upgrade existing facilities by installing new electronics and equipment necessary to render existing loops capable of providing the service they want. The installation of this equipment, which is not part of Verizon's existing network, would require Verizon to make substantial investments in new equipment and to undertake significant construction activity. Nevertheless, these carriers not only argue that Verizon should have to incur the cost and burden of upgrading the existing network at their behest, the same carriers turn around and claim in state proceedings that they should not be required to pay the costs for this construction and network upgrade.

Verizon's provisioning policy is simple and straightforward. Where Verizon has the facilities to provision the service requested, Verizon will provide those facilities to competing carriers on an unbundled basis. Verizon, however, will not construct network facilities solely for the purpose of unbundling them for competing carriers. Contrary to what competing carriers claim, this does not mean that competing carriers are barred from access to Verizon's network. Competing carriers can always obtain access to Verizon's network through Verizon's special access services, and can do so to the same extent as can Verizon's own retail customers. Verizon's current provisioning policy is, therefore, fully compliant with the Act.

1. As an initial matter, both the Commission and the Courts have expressly held that incumbents are not required to construct new facilities solely for the purpose of unbundling them for competing carriers. The Commission and the Courts have made clear that incumbent carriers are not required to construct network facilities solely for the purpose of providing unbundled network elements to competitors. As the Eighth Circuit explained in *Iowa Utilities Board v. FCC*, "[s]ubsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's *existing* network – not a yet unbuilt superior one." *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (emphasis in original), aff'd in part and remanded in part, *AT&T v. Iowa Util. Bd.*, 525 U.S. 366 (1999). The Eighth Circuit reaffirmed this holding on remand from the Supreme Court, and this aspect of the Eighth Circuit's decision has never been challenged. *Iowa Util. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *reversed in part sub nom, Verizon v. FCC*, 2002 U.S. LEXIS 3559 (May 13, 2002). It is, therefore, final and binding.

Likewise, the Commission has limited the provision of unbundled network elements to the incumbent's existing network facilities. In the Commission's *First Report and Order*, for example, the Commission "expressly limit[ed] the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities." 11 FCC Rcd 15499, ¶ 451 (1996) (emphasis in original). Again in the *UNE Remand* decision the Commission explained: "[W]e do not require incumbent

LECS to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use." 15 FCC Rcd 3696, ¶ 324 (1999). And the Commission just recently reiterated that same key principle in its *Virginia Arbitration Order*, Virginia Arbitration Non-Cost Order ¶ 468 ("[t]he Act does not require [Verizon] to construct network elements, including dark fiber, for the sole purpose of unbundling those elements for ... other carriers"). Moreover, there is no logical basis for distinguishing loops from transport. The underlying principal is the same: an incumbent carrier's unbundling obligation extends only to its existing network, not to some yet-to-be-built network.

Verizon's policy for provisioning unbundled network elements complies fully with the Act and with these decisions. Verizon's provides unbundled network elements, including DS-1 capable loops, where the facilities necessary to provision the service requested exist and are available.

2. There is no question that incumbents are not required to deploy copper or fiber loop facilities solely to unbundle them. While competitive carriers have complained about Verizon's policy, none seriously dispute that Verizon is not required to deploy new copper or fiber cable to provide requesting carriers unbundled loops where they otherwise would not exist, and for good reason. Given the Act's (and the Commission's) goal of encouraging facilities-based competition, it simply makes no policy sense to have incumbent carriers like Verizon lay new copper or fiber cable to expand the capabilities of their existing physical networks for use as unbundled elements. Competing carriers are equally positioned to make these investments to develop their own networks and, consistent with the purpose of the 1996 Act, should be encouraged to do so. Furthermore, because unbundled element pricing gives competing carriers the lowest prices without any competitive risks, it discourages competing carriers from investing in their own network facilities and equipment. In the end, competing carriers become even more dependent upon the incumbent's network, an outcome clearly at odds with the Act and the Commission's policies.

3. Incumbents also are not required to deploy new equipment or undertake major construction to upgrade existing loop plant facilities solely in order to unbundled these facilities. Although competing carriers have argued that Verizon should be required to install various types of equipment and undertake various construction activities to upgrade the network, they have focused their argument recently primarily on two components of Verizon's provisioning policy. Specifically, they claim Verizon must install new multiplexers (for fiber loops) and new apparatus cases as well as the repeaters that go into these cases (for copper loops) where this equipment currently does not exist. But these situations are no different. As Verizon has explained elsewhere, the installation of new multiplexers or a new apparatus case, like the deployment of new copper or fiber cable, requires a significant investment in new equipment and labor costs. *See* October 18, 2002 Letter from W. Scott Randolph to Marlene H. Dortch, CC Docket Nos. 01-338, 96-98, and 98-147. In many instances, Verizon must actually purchase this equipment from third party vendors and then, because of the complexity of the installation, which is summarized in Attachment A to this letter, have the equipment installed by them or by Verizon technicians skilled in performing specialized construction work.

Given the significant investment in equipment and labor costs required to construct these facilities, Verizon's decision not to invest in and deploy this equipment solely for the purpose of providing competing carriers unbundled network elements stems from three very real concerns.

First, UNE prices do not cover the additional costs of constructing network elements at the request of a competing carrier. Based on conservative estimates, however, had Verizon purchased and installed the equipment necessary to fulfill UNE orders that were rejected for these reasons alone, it would have expended millions of dollars for equipment and labor costs last year, but would have had no way to recover its investment.

Second, given the current volatility of the telecommunications industry, there is a significant risk that Verizon will be left with stranded or underutilized facilities for which it cannot recover its costs. This risk is twofold. Initially, Verizon cannot increase the capacity of its network on a circuit-by-circuit basis. When a competing carrier orders one DS-1, the installation of multiplexers to fill that order would result in capacity to fill anywhere from 4 to 28 DS-1 circuits for an asynchronous system and 28 to 84 DS-1 circuits for a full SONET system. Similarly, the installation of an apparatus case to fill one DS-1 order would result in capacity, depending upon the size of the apparatus case, to fill anywhere between 2 and 16 DS-1 circuits. As a result, even apart from the fact that Verizon does not recover the costs for even the capacity that is used, the portion of the capacity that is unused becomes stranded.

Third, Verizon also faces a further risk that it will be left with stranded investment once a competitive carrier transitions to its own facilities. That is, if competitive carriers are using unbundled network elements as they were intended to be used – as a transition to facilities-based competition – they will soon abandon the facilities that they demanded Verizon construct on their behalf and transition their end user's circuits to their own facilities. But having built the facilities solely for the purpose of providing them to the competitive carrier on an unbundled basis, Verizon will be left again with stranded investment in unused or underutilized facilities. While Verizon also obviously faces some degree of risk when it constructs the same facilities to serve its special access customers, with its special access services, Verizon has a better opportunity to recover at least some of the cost of constructing these facilities.

Accordingly, to alleviate these concerns when providing unbundled network elements, and at the same time address competitive carriers' desire to obtain these facilities, Verizon has established a procedure under which it voluntarily allows carriers whose UNE orders are rejected for lack of facilities to purchase Verizon's special access service and later convert it to a UNE after a minimum in-service period (provided it meets the conversion criteria established by the Commission). To be sure, the solution is not perfect. Verizon still faces a substantial risk that these facilities will be underutilized after the investment is made. But this process at least allows Verizon to recoup some of the costs it incurs in purchasing and installing this equipment through the imposition, for a period of time, of access rates.

Not surprisingly, Verizon's opponents have offered little in the way of a response to these concerns. Nonetheless, some carriers argue here that the Commission should establish a new rule that would require Verizon to do what the Commission and the Courts have already said it is not required to do – namely, build new facilities where they do not currently exist solely to unbundled them.

4. The Commission's rational for its previous loop conditioning requirements cannot justify a requirement that incumbents engage in new construction to provide unbundled network elements. Analogizing to the current loop conditioning requirements, competitive carriers argue that Verizon should simply be required to purchase and install apparatus cases and multiplexers and then provide the facilities to its competitors. This is necessary, they argue, to allow them to gain full use of the existing loop.

As an initial matter the current loop conditioning requirements violate the Act. Through the loop conditioning rules, the Commission has required incumbent carriers to remove equipment from the loop that was put there to make the loop suitable for voice service, but which may make the loop less suitable for high-speed data service. The loop conditioning rules, therefore, are themselves a requirement that incumbents upgrade existing loop facilities so that they can be used to provide a service that they otherwise could not support – i.e. a requirement to provide superior quality service.

For the sake of argument, however, we will put aside the question of the lawfulness of the current loop-conditioning rules, although the D.C. Circuit Court left that open when it reviewed the Commission's *UNE Remand* order (because those rules were vacated for the separate reason that the Commission has misapplied the Act's impairment standard). Regardless, what Verizon's competitors seek here is entirely different from loop conditioning. As the Commission explained in its *UNE Remand* order, the loop conditioning rules required incumbent carriers to *remove* devices that prevent the existing loop from being used to provide a service (DSL) that the loop could otherwise support. No new equipment had to be deployed.

In contrast, what competitive carriers seek in the no facilities situation is to require Verizon to purchase and install on the loop new equipment so that the loop can support a service that it otherwise is not capable of supporting. But, as explained above, the Commission has never required incumbents to invest in new equipment or to undertake significant construction activity to upgrade a loop to support a service that it otherwise could not support. Doing so is not unbundling a loop with its capabilities intact; rather, it is upgrading the network to provide a superior quality network facility – precisely what the Eighth Circuit has held incumbents are not required to do.

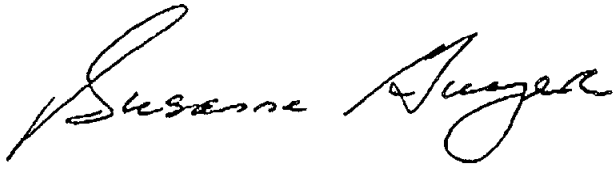
Finally, it is not difficult to discern the end game Verizon's opponents have in mind in advancing this argument. Verizon's opponents argue today that purchasing and installing this new equipment is equivalent to the type of work Verizon must perform when it conditions a line. They claim this construction and these upgrades are required to allow them to take full advantage of the incumbent's existing network facilities because without it, the capacity does not exist. But once they are successful in requiring the facilities to be built, they then argue that they should not be required to pay for the costs of the construction or network upgrades because the incumbent already recovers those costs through TELRIC rates. In a hypothetically efficient and forward-looking network, they argue, this equipment would not be necessary; therefore, they should not be required to pay for the costs of installing it now. This Commission rejected the same argument when it was made with respect to line conditioning. *UNE Remand* at ¶ 193 ("[U]nder our rules, the incumbent should be able to charge for conditioning such loops."); *see also* FCC Reply Brief, *Verizon Communications, Inc. v. FCC.*, Case No. 00-511 at, 10, n.7. (S.Ct. filed July 2001). Nevertheless, several state commissions have accepted it

Indeed, although this Commission has clearly stated that incumbents are allowed to recover the costs of loop conditioning, *e.g. UNE Remand at ¶ 193*, Verizon's competitors have been successful in several states in getting the charges significantly reduced or eliminated altogether. In Maryland, for example, the Maryland Commission has held that "there shall be no charge for load coil removal for loops greater than 18,000 feet (Verizon imposes no charge for loops less than 18,000) ... and no charge ... to all bridged taps removed in excess of 2,500 feet ...." *In the Matter of the Arbitration of Rhythms Links, Inc. and Covad Communications Company v. Bell Atlantic-Maryland, Inc. Pursuant to Section 252(b) of the Telecommunications Act*, pp. 32-36. Similarly, the Massachusetts Commission initially rejected entirely Verizon's proposed charges for loop conditioning on the grounds that "loop conditioning would not be

necessary in a network with all fiber feeder ...." D.T.E. 98-57—Phase III at pp. 94-103, and later allowed Verizon to impose some charge for removing bridge tap "from CSA-compliant loops *unless* the CLEC can demonstrate to the Department that such an offered loop does not support any xDSL service (in which case such conditioning work will be performed by Verizon at no charge.) (emphasis added)." Phase III-B Clarification Order, D.T.E. 98-57-Phase III. Verizon's concern that it will not be compensated for making these investments, therefore, is entirely justified.

In short, Verizon's provisioning policy draws the line consistent with the Act's requirements and the Commission's policies.

Sincerely,



ATTACHMENT A

I. Installation of an Apparatus or Doubler Case.

For DS-1 loops greater than 12,000 feet, a doubler, which is also known as a repeater, regenerator, or range extender, is required to amplify the HDSL signal. Doublers are often used to "boost" a signal traveling over long distances. These doublers are housed in an apparatus or doubler case that is spliced into the loop at a location where the electrical properties of the copper loop no longer support the HDSL signal. The exact location is dependent on the loop make up (gauge, average ambient temperature and sheath type) of the cable pair but is typically 9000-12,000 feet. Accordingly, if the cable pairs or loop available for assignment to the end user's serving terminal are greater than 12,000 feet and do not contain an apparatus case, construction work would be required to add this new equipment before a DS-1 could be provisioned.

The construction work required to install an apparatus case is complex. As an initial matter, the cable sheath containing the pairs must be secured and spliced into. The work required to do this depends on the physical location of the work (building, street, right of way) and the cable plant type (aerial, underground, direct buried) of the apparatus design location.

- Aerial cable is typically accessed using bucket trucks after complying with any local traffic control requirements.[1]

- Direct buried cable is accessed, where possible, through splice enclosures that come out of the ground at splice points determined by the cables' original design/placement. If the apparatus design location does not coincide with a nearby existing splice location, the cable sheath must be marked (via Dig Safe procedures) and exposed, consistent with local traffic control regulations.

- Underground cable sheaths must be accessed through a manhole. In addition to complying with local and state requirements and regulations,[2] the manhole must be pumped and filtered of any water and sediment and then tested and cleared of any hazardous materials or gases. Provided there are no safety issues, the manhole can be entered and the splicing work can proceed.

Once the cable sheath is secured, access to the cable pairs within the sheath is accomplished either by entering an existing splice (if one exists) or splicing into the cable – cutting into the cable sheath directly and then pulling slack or adding additional slack cable to

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[1] Most municipalities require traffic control and a police detail when placement of the vehicle will impede traffic flow.

[2] Most municipalities require a police detail for local traffic control before the work can proceed. Similarly, most states require that the Manual on Uniform Traffic Control Devices ("MUTCD") be adhered to. In addition, most States have a Department of Environmental Management requirement to test sediment contents for contaminants. If hazardous materials are present, special removal processes may need to be followed, and Verizon typically contracts this work out to third parties. If no hazardous materials are found, pumping and filtering of the manhole may proceed.

create a new splice. If the cable is pressurized, as is the case with most underground cable, the sheath also will need to be buffered before this work can begin.[3]

Once the relevant cable pairs within the sheath have been secured, a new apparatus case must be mounted. This apparatus case housing is typically mounted to a wall, pole, or buried enclosure, and the cable stubs to the equipment are connected to the cable pairs in the new splice. After that is done, Verizon then must order and install the necessary doublers before the service can be provisioned. This construction work, therefore, requires the installation of new equipment, something Verizon is not required to do. And without this construction work, the facilities necessary to provision the service do not exist and cannot be unbundled.

II. Installation of Fiber and Multiplexers.

To provision a DS-1 loop over fiber, there must be fiber cable and multiplexer capacity in both the central office and at the end user's location. If there is no fiber cable or multiplexer capacity, in either the central office or at the end user's location, construction would be required to add new fiber cable or multiplexers before the DS-1 or DS-3 could be provisioned.

This construction work includes planning, designing, and installing fiber cable to the end user's location. Once Planning engineers identify the most suitable path for the fiber facilities to connect to the end user's location, Design engineers identify structural requirement – manholes, pole licensing/placement/rearrangements, building entrance conduit, terminal space requirements, right of way requirements, ect. – for the placement of the facilities and then do a detailed design for construction forces that will install those facilities.

Once the detailed design is complete, physical construction can begin and typically includes:

- Securing access to manholes, poles and/or buried cable;
- Constructing new manholes, poles and conduit;
- Securing permits and/or rights of way;
- Establishing a safe work area in public rights of way;
- Installing the cable in or on the new/existing structure;
- Installing terminals; and
- Splicing cable in manholes, on poles, in buried enclosures and in buildings

Fiber facilities require specialized splicing operations (fusion splicing, "clean room" conditions) to establish continuity in the fiber. The fiber is terminated in specially designed fiber distribution bays in the central office and fiber trays at the customer location. Once installed, the fiber must be accepted with a series of Optical Time Domain Reflectometer ("OTFR") equipment and then connected to an optical multiplexer.

The installation of the requisite multiplexers in the central office and at the end user's location is equally complex and time consuming. Once engineers have planned and designed the work, which includes ordering the equipment and common cards and securing adequate space in a relay rack and power both in the central office and at the end user's location, technicians must

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[3] Buffering is a procedure where a temporary bypass air pipe is installed to permit uninterrupted airflow to the field side of the splice in order to prevent cable failures due to water intrusion while the splice work is in progress.

install the equipment to construct the facilities. The central office installation is performed by third party vendors and/or Verizon technicians. Verizon technicians perform the installation of multiplexers in remote terminals or at the end user location.

This construction work includes installing the equipment into the relay racks; running cable to appropriate termination points – Digital Cross Connect (DSX) Panels, Digital Access and Cross Connect Systems (DACS), and Distribution Frame/Terminal Blocks – within the Central Office and at the end user's location, which in some instances may require running cable through multiple floors of the central office; testing the equipment; and updating appropriate equipment inventory systems. Without this construction work, the facilities necessary to provision the service do not exist and cannot be unbundled.